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Nos. 03-184 and 03-1034

In the Supreme Court of the United States

CLAUDE M. BALLARD AND MARY B. BALLARD,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ESTATE OF BURTON W. KANTER, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE ELEVENTH AND SEVENTH CIRCUITS

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

When a case is assigned to a special trial judge of the United States Tax Court, the special trial judge is required to make a "report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will [then] assign the case to a Judge or Division of the Court." Tax Ct. R. 183(b). The Judge to whom the case is assigned "may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part." Tax Ct. R. 183(c). The questions presented are:

1. Whether the Due Process Clause requires that the "original" report of a special trial judge be made public by inclusion in the record so as to facilitate appellate review.

2. Whether 26 U.S.C. 7459(b), 7461(a), (b), or 7482 requires that the "original" report of a special trial judge be made public by inclusion in the record so as to facilitate appellate review.

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No. 03-184

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v.

COMMISSIONER OF INTERNAL REVENUE

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v.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH AND SEVENTH CIRCUITS

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals in No. 03-184 (Ballard) (Pet. App. 1a-18a) is reported at 321 F.3d 1037. The opinion of the Tax Court (Pet. App. 19a-306a) is unofficially reported at 78 T.C.M. (CCH) 951.

The opinion of the court of appeals in No. 03-1034 (Kanter) (Pet. App. 1a-97a) is reported at 337 F.3d 833. The opinion of the Tax Court (Pet. App. 98a) is unofficially reported at 78 T.C.M. (CCH) 951.

JURISDICTION

The judgment of the court of appeals in No. 03-184 was entered on February 13, 2003. A petition for rehearing was denied on May 5, 2003 (Pet. App. 307a). The petition for a

writ of certiorari was filed on August 4, 2003, and was granted on April 26, 2004.

The judgment of the court of appeals in No. 03-1034 was entered on July 24, 2003. A petition for rehearing was denied on October 21, 2003 (Pet. App. 115a). The petition for a writ of certiorari was filed on January 20, 2004, and was granted on April 26, 2004.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution is set forth at 03-1034 Pet. App. 116a. Sections 7443A, 7459(a) and (b), 7461(a), and 7482(a)(1) of the Internal Revenue Code, 26 U.S.C. 7443A, 7459(a) and (b), 7461(a), 7482(a)(1), and Tax Court Rule 183 are set forth in the appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

Under Section 7443A(b)(4) of the Internal Revenue Code, the Chief Judge of the United States Tax Court may designate a special trial judge (STJ) to hear, but not decide, any proceeding. Where an STJ hears a case under that provision, Tax Court Rule 183 requires the STJ to prepare and submit a report of the proceeding, including recommended factual findings and legal conclusions, to the Chief Judge, who then assigns the case for decision to a regular judge of the Tax Court. See Tax Ct. R. 183(b). The judge to whom the case is assigned "may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part," and gives "[d]ue regard" to the STJ's role as hearing examiner and "presum[es]" that the STJ's factual findings are "correct." Tax Ct. R. 183(c).

In the proceedings below, the courts of appeals held that where a regular Tax Court judge adopts an STJ's report and publishes the report in an opinion, any "original" report that

the STJ may have submitted that differs from the STJ's final published report need not be disclosed to the parties or included in the record. Those decisions are correct: Well-settled principles of constitutional law and the longstanding interpretation of Tax Court procedures make clear that such disclosure is not required.

1. The Tax Court was first established in 1924 as the Board of Tax Appeals, an independent agency in the executive branch of the Government that exercised limited jurisdiction over certain tax disputes prior to the payment of the disputed tax. See Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337. The Board became the Tax Court of the United States in 1942, see Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 957, but remained an executive agency until 1969. In that year, Congress formed the modern Tax Court as a legislative tribunal under Article I of the Constitution with authority to adjudicate specific income, estate, and gift tax disputes before payment of the tax. See Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730; 26 U.S.C. 7441. The court is composed of 19 regular judges who are appointed for 15-year terms but may be removed by the President for "inefficiency, neglect of duty, or malfeasance in office," 26 U.S.C. 7443(e) and (f), and several STJs who are periodically appointed by the Chief Judge. See Tax Reform Act of 1984, Pub. L. No. 98-369, § 464(a), 98 Stat. 824; 26 U.S.C. 7443A(a).

STJs have statutory authority to hear cases and enter the decision of the Tax Court in declaratory judgment proceedings, "small tax cases," and levy and lien proceedings. See 26 U.S.C. 7443A(b)(1)-(3) and (c) (1994). STJs may also exercise authority under Section 7443A(b)(4) of the Internal Revenue Code to "hear" "any other proceeding which the chief judge may designate," but may not enter decisions in those cases.

See 26 U.S.C. 7443A(b)(4) and (c) (1994).[1] If an STJ hears a case pursuant to Section 7443A(b)(4), Tax Court Rule 183 requires the STJ to prepare a report, which is transmitted to the Chief Judge of the Tax Court, who then assigns the case to a regular Tax Court judge for decision. See Tax Ct. R. 183(b). The Tax Court judge may "adopt the Special Trial Judge's report" or "modify it" or "reject it in whole or in part," and gives "[d]ue regard * * * to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Tax Ct. R. 183(c).

2. This case arises out of a tax dispute between the government and Burton Kanter, Claude Ballard, and a third party, Robert Lisle. The late Burton Kanter was a well-known attorney and academic with expertise in federal income and estate taxation. 03-184 Pet. App. 45a-46a.[2] Claude Ballard is a former senior vice-president of Prudential Insurance Co. of America (Prudential), a position in which he exercised influence over Prudential's purchase and development of real estate, as well as Prudential's choice of builders and contractors for construction projects. *Id.* at 46a-47a. Like Ballard, Robert Lisle was a former Prudential vice-president, a capacity in which he exercised authority over

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[1] Section 7443A(b)(4) has been re-designated as 26 U.S.C. 7443A(b)(5). See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401(c), 112 Stat. 749-750. Because this case was decided under the previous version of the Code, we will refer only to that version in this brief.

[2] As the court below observed, "from 1979 to 1989 Kanter, the highly successful tax attorney, who hobnobbed with Pritzkers and Hollywood producers and who participated in countless extremely large and lucrative business ventures, reported a negative adjusted gross income each year on his federal tax return and paid no federal income taxes." 03-1034 Pet. App. 2a-3a.

the award of Prudential loans and construction contracts. *Id.* at 47a.

Sometime between 1968 and 1970, Kanter met Ballard and Lisle, and the three agreed that Kanter would sell Ballard's and Lisle's influence over Prudential business and launder the proceeds through a complex network of corporations and trusts controlled by them. 03-184 Pet. App. 48a. Specifically, Kanter arranged for five individuals seeking Prudential business to pay kickbacks to an entity he controlled, called Investment Research Associates, Ltd. (IRA), or to one of IRA's subsidiaries, and those funds would then be commingled with other money in an account controlled by a different Kanter entity. *Id.* at 48-49a. Some of the funds were then distributed to Kanter, Ballard, and Lisle as "commissions, consulting fees, or directors fees." *Id.* at 49a. Larger portions of the payments were "distributed to three of IRA's subsidiaries; more specifically, 45 percent to Carlco, Inc. (Carlco) (controlled by Lisle), 45 percent to TMT, Inc. (TMT) (controlled by Ballard), and 10 percent to BWK, Inc. (controlled by Kanter)." *Ibid.* By the end of 1983, IRA had accumulated $4,771,445 in payments from the five bribers, which were distributed in the 45-45-10 ratio to TMT, Carlco, and BWK but not reported on Kanter's, Ballard's, or Lisle's tax returns. *Id.* at 5a.

After discovering the scheme, the Commissioner of Internal Revenue issued notices of deficiency to Ballard, Kanter, and Lisle, seeking unpaid taxes and, later, civil fraud penalties in connection with the millions of dollars of unreported kickbacks. 03-184 Pet. App. 5a. All three sought review in the Tax Court, and their cases were consolidated for hearing before STJ D. Irvin Couvillion pursuant to Section 7443A(b)(4). *Id.* at 33a. After a lengthy trial, in which thousands of exhibits consuming hundreds of thousands of pages were placed in evidence, STJ Couvillion submitted a report of the proceedings to then-Chief Judge

Cohen, who referred the case to Tax Court Judge Howard A. Dawson for decision. *Id.* at 5a-6a, 311a; 03-1034 Pet. App. 3a.

On December 15, 1999, Judge Dawson issued an opinion for the Tax Court, holding Kanter, Ballard, and Lisle liable for underpaid taxes and assessing a fraud tax penalty against them. 03-184 Pet. App. 19a-306a. Judge Dawson's opinion states that the Tax Court "agrees with and adopts the opinion of the Special Trial Judge," which the court "set[s] forth" in the margin of its opinion. *Id.* at 33a. The STJ opinion, in turn, analyzes the documentary and other evidence in painstaking detail and carefully traces the millions of dollars paid to IRA and its subsidiaries through the web of corporations and entities controlled by Kanter, Ballard, and Lisle, see *id.* at 49a-229a. The STJ opinion concludes that Kanter, Ballard, and Lisle had "entered into arrangements pursuant to which [Kanter] would use his business and professional contacts, including his relationships with * * * Ballard, and Lisle, to assist individuals and/or entities in obtaining business opportunities or in raising capital for business ventures" with Prudential in return for kickbacks, which Kanter would launder through "a complex organization of corporations, partnerships, and trusts," but not report as income for tax purposes. *Id.* at 48a.

3. On April 20, 2000, Kanter, Ballard, and Lisle filed a motion seeking access to "all reports, draft opinions or similar documents prepared and delivered to the Court pursuant to Rule 183(b)" by STJ Couvillion, or in the alternative for the court to include a copy of those materials in the record transmitted to the appellate court. 03-1034 Pet. App. 107a-108a.

The Tax Court denied the motion. 03-1034 Pet. App. 107a-112a. It observed that STJ Couvillion's report "ultimately became the Memorandum Findings of Fact and Opinion (T.C. Memo. 1999-407) filed on December 15, 1999," see *id.* at 108a, and that the procedures followed in the case complied

with Internal Revenue Code Section 7443A(b)(4) and Tax Court Rule 183. *Id.* at 108a-109a. Because the STJ lacked authority "actually to decide" the case, moreover, the Tax Court concluded that the motion amounted to an improper request for access to "confidential" materials that "relate to the internal deliberative processes of the Court." *Id.* at 109a.

Ballard, Kanter, and Lisle subsequently filed a motion for reconsideration, citing an affidavit from Randall G. Dick, counsel for Kanter. 03-1034 Pet. App. 99a-100a, 101a. The affidavit asserts that two or three judges of the Tax Court had informed counsel that the "original report" that STJ Couvillion submitted to the Chief Judge concluded, contrary to the report ultimately set forth in the Tax Court's decision, that the petitioners should not have been assessed a tax or a fraud penalty. *Id.* at 101a-102a.

In an opinion signed by Chief Judge Wells, Judge Dawson and STJ Couvillion, see 03-184 Pet. App. 315a-316a, the court again denied the motion. *Id.* at 312a-316a. The court's order states that "[t]he only official Memorandum Findings of Fact and Opinion by the Court in these cases is T.C. Memo. 1999-407, filed on December 15, 1999, by Special Trial Judge Couvillion, reviewed and adopted by Judge Dawson, and reviewed and approved by former Chief Judge Cohen." *Id.* at 314a-315a.

4. Ballard, Kanter, and Lisle immediately filed petitions for mandamus in the Eleventh, Seventh, and Fifth Circuits, respectively, seeking an order directing the Tax Court to provide them with a copy of the "original" report prepared by STJ Couvillion. The petitions for writs of mandamus were denied. *In re Ballard*, No. 00-14762-H (11th Cir. Oct. 23, 2000); *In re Investment Research Ass'ns*, No. 00-3369 (7th Cir. Dec. 15, 2000); *In re Estate of Lisle*, No. 00-60637 (5th Cir. Sept. 18, 2000).

Ballard, Kanter,[3] and Lisle subsequently filed appeals in the Eleventh, Seventh, and Fifth Circuits, respectively. All three courts of appeals concluded that the taxpayers are not entitled to any "original report" of STJ Couvillion. 03-184 Pet. App. 1a-18a; 03-1034 Pet. App. 1a-97a; *Estate of Lisle* v. *Commissioner*, 341 F.3d 364 (5th Cir. 2003).

a. **No. 03-184.** The Eleventh Circuit, considering Ballard's appeal, affirmed the Tax Court's decision in its entirety. 03-184 Pet. App. 1a-17a. With respect to Ballard's argument that the Tax Court unconstitutionally withheld "the findings of the [STJ]" from the parties, *id.* at 2a, the court of appeals concluded that the argument was incorrectly "premised upon the assertion that the underlying report adopted by the Tax Court is not, in fact, [STJ] Couvillion's report." *Id.* at 9a. In the Eleventh Circuit's view, the record belied that assumption as it "clearly reveals that the report adopted by the Tax Court is [STJ] Couvillion's report." *Ibid.*

Even if the STJ had initially filed a report with the Chief Judge that differed from the final report adopted by the Tax Court, non-disclosure of the initial report would "not give rise to due process concern." 03-184 Pet. App. 9a. The court reasoned that:

> [T]here is nothing unusual about judges conferring with one another about cases assigned to them. These conferences are an essential part of the judicial process when, by statute, more than one judge is charged with the responsibility of deciding the case. And, as a result of such conferences, judges sometimes change their original position or thoughts. Whether Special Trial Judge Couvillion prepared drafts of his report or subsequently changed his opinion entirely is without import insofar as

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[3] Kanter died on October 31, 2001, and his estate has been substituted as petitioner in his case. 03-1034 Pet. App. 1a.

> our analysis of the alleged due process violation pertaining to the application of Rule 183 is concerned. Despite the invitation, this court will simply not interfere with another court's deliberative process.

Id. at 9a-10a. With respect to Ballard's challenges to the sufficiency of the evidence, the court of appeals held that "[t]he record supports" the imposition of taxes and a fraud penalty for the kickbacks. *Id.* at 14a.

b. **No. 03-1034.** The Seventh Circuit similarly affirmed the decision of the Tax Court with respect to Kanter. 03-1034 Pet. App. 1a-70a. The court of appeals rejected the argument that the "STJ's original report must be made a part of the record on appeal" in order to "determine whether the appropriate degree of deference had been paid to it by the Tax Court judge." *Id.* at 6a. In the Seventh Circuit's view, the argument was "immaterial" because "the underlying report adopted by the Tax Court was in fact Special Trial Judge Couvillion's." *Id.* at 7a. As a result, "[a]ny differing preliminary recommendations [by the STJ]—if they ever existed—would no longer be constitutionally relevant because the STJ has abandoned them." *Id.* at 13a.

Considering Kanter's claim that the judicial deliberations of the Tax Court were "quasi-collaborative" such that "an STJ's initial findings are malleable," the court of appeals concluded that such a system "would not offend our notions of fundamental fairness, nor would due process require the inclusion of the report in the appellate record to preserve the fairness of our review." 03-1034 Pet. App. 7a. Rather, "Congress intended STJ reports to be treated as preliminary findings comprising part of the Tax Court's internal deliberative process." *Id.* at 9a. Turning to the merits, the court of appeals concluded that the Tax Court's findings were not clearly erroneous and affirmed its legal conclusions.

Judge Cudahy concurred in part and dissented in part. 03-1034 Pet. App. 70a-97a. Judge Cudahy read the record to

support "the notion that the Tax Court engages in a quasi-collaborative process of review of the STJ's report from which a new and frequently different STJ's opinion emerges to be adopted and agreed with by the Tax Court." *Id.* at 74a. Although agreeing that such a collaborative procedure does not violate Tax Court Rule 183, see *id.* at 79a-80a, Judge Cudahy opined that such a process violates due process because it deprives the parties of "meaningful appellate review," *id.* at 96a, namely a determination of whether the Tax Court properly deferred to the STJ's credibility findings. *Id.* at 88a-97a.

c. Although its decision is not before the Court, the Fifth Circuit in *Estate of Lisle* v. *Commissioner*, 341 F.3d 364, 384 (2003), also concluded that "application of Rule 183 in this case did not violate Appellants' due process rights" based on "the reasoning of the Seventh and Eleventh Circuits." On the merits of Lisle's claim, the court of appeals concluded that the Commissioner had not carried his burden of establishing fraud with respect to Lisle and reversed the fraud penalties assessed by the Tax Court. *Id.* at 385.

SUMMARY OF ARGUMENT

I. A. Petitioners' primary contentions—that disclosure of the STJ's report is constitutionally and statutorily mandated in order to permit full appellate review and to ensure that the Tax Court has reviewed the STJ's recommended findings under a deferential standard—are not properly presented in these cases. STJ Couvillion's final report was adopted in full by the Tax Court, disclosed to the parties, and included in the record of this case. Accordingly, this case does not present any question concerning the proper degree of deference to be given an STJ's recommendations, nor does it present the question whether disclosure of reports reflecting an STJ's final recommendations is required. Rather, the only question is whether disclosure of an "original" report that was filed with the Chief Judge and later abandoned by

the STJ is required by the Due Process Clause or federal statute. It is not.

B. It is well settled that disclosure of a judge's deliberative processes is shielded from discovery by the parties. Petitioners attempt to divine some special reason for disclosing STJ Couvillion's deliberative process by asserting that the STJ was improperly influenced, but that claim lacks evidentiary support. Indeed, because this Court presumes that judges do not engage in misconduct, petitioners cannot be permitted to probe the STJ's deliberative process in the hope of discovering improper conduct.

Petitioners could gain nothing from mere disclosure of any "original" STJ report, because, as the findings below make clear, the published report accurately reflects the STJ's final recommended disposition of the case. Any differences between that final report and an "original" recommendation —like differences between a draft and final opinion—would not demonstrate improper influence or a failure to defer to the STJ's recommendations, but would presumptively be the result of the STJ's legitimate reevaluation of the case. Petitioners could not hope to substantiate their allegations of improper influence without still further intrusive discovery such as depositions of the judges involved, a result that is barred by precedent.

II. A. Even if presented in this case, petitioners' disclosure arguments would fail. Non-disclosure of the STJ's report does not preclude effective appellate review, because an STJ does not function as a trial court judge whose factual recommendations must be accepted on appeal absent "clear error." To the contrary, in cases such as this, STJs are prohibited by statute from functioning as original finders of fact.

The drafting history of Tax Court Rule 183 demonstrates that Rule 183 was designed to eliminate disclosure and appellate-style review of STJ reports. The "due regard" and

"presumed to be correct" language on which petitioners rely does not give rise to an enforceable right to appellate review, but rather guides the judges of the Tax Court in a way that reflects that the STJ had the opportunity to hear witnesses. Indeed, that language was added as part of an amendment intended to *expand* the Tax Court's options with respect to STJ reports, not limit its discretion over them.

B. The Tax Court's procedures comport with due process. This Court has held that tax disputes involve "public rights," and thus the full panoply of Article III protections is not required here. Nor is the Tax Court's non-disclosure practice unique, as petitioners mistakenly contend. Indeed, Congress has long mandated a similar practice with respect to decisions of regular Tax Court judges that are subject to full court review. Similarly, agency boards of contract appeals generally do not disclose the initial proposed dispositions of presiding judges who actually receive evidence.

In any event, mere novelty would not render the Tax Court's rules unconstitutional. The available evidence suggests that the Tax Court eliminated its disclosure requirement in 1984 to unify the court's decisional process and accommodate a tremendous influx of tax-shelter cases in the mid-1980s. Due process does not foreclose such procedural innovations.

C. Disclosure of the STJ's credibility assessments is unnecessary to prevent the Tax Court from rejecting those assessments "without seeing and hearing the witness" in violation of *United States* v. *Raddatz*, 447 U.S. 667, 681 n.7 (1980). In noncriminal, administrative cases, this Court has rejected claims that due process requires a non-Article III decisional authority to defer to a hearing officer's factual determinations or hear evidence firsthand. In any event, Tax Court Rule 183 contains the sorts of safeguards identified in *Raddatz* as sufficient to permit de novo review of a hearing examiner's credibility assessments.

D. The Tax Court's rules are not invalid under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Petitioners have no legitimate interest in the disclosure of internal judicial deliberations, and petitioners' broader interest in the fair adjudication of their claims is amply protected by the procedural protections afforded. Any interest in disclosure would not outweigh the government's substantial interests in ensuring considered and confidential judicial decisionmaking and promoting expeditious resolution of tax cases.

III. The Internal Revenue Code does not compel disclosure of STJ reports. The appellate review provision, 26 U.S.C. 7482(a)(1), merely provides that Tax Court decisions are not entitled to any special deference, but are reviewed in the same manner as district court decisions. With respect to the Code's disclosure provisions, the Tax Court is required to publish an STJ report to the extent the court adopts the report's findings of fact and conclusions of law, see 26 U.S.C. 7459(b), 7461, but the provisions, by their terms, require no further disclosure.

ARGUMENT

I. PETITIONERS' CHALLENGES TO THE TAX COURT'S PRACTICES ARE NOT PROPERLY PRESENTED IN THESE CASES

A. The STJ's Recommended Findings Were Not Reversed Or Set Aside, But Were Instead Adopted And Disclosed In The Tax Court's Decision

Petitioners' primary challenges to the decisions below rest on the premise that disclosure of the STJ's "original" report is necessary to permit meaningful appellate review and to determine whether the Tax Court judge gave proper deference to the STJ's recommended findings. According to petitioners, the Tax Court "revers[ed] critical findings of fact, including credibility judgments, of the judge who had tried the case" (03-1034 Br. 1), but by preserving the confidential-

ity of its decisional process the Tax Court has made it "impossible for any reviewing Article III court to determine if" the Tax Court judge "did indeed give 'due regard' to" the STJ's recommendation (03-184 Br. 19).

The first, and most basic, flaw in petitioners' arguments is that they ignore the actions actually taken by the Tax Court. As we explained at the certiorari stage (03-184 Br. in Opp. 13; 03-1034 Br. in Opp. 12-13, 17), the findings of the Tax Court, affirmed on appeal by three appellate courts, conclusively establish that the Tax Court *accepted* the recommendations of the STJ, *adopted* his final report, and disclosed it by publishing it as the opinion of the court. See 03-184 Pet. App. 33a-306a. Thus, this case does not properly present the questions of what deference, if any, the Tax Court should give an STJ's recommendations before *rejecting* them or whether disclosure of an STJ's report is necessary to permit appellate review of a Tax Court judge's *rejection* of such a report. Resolution of those questions must "await a day when the issue[s] [are] posed less abstractly." *The Monrosa* v. *Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

It is beyond dispute that the Tax Court's opinion contains an accurate and full reproduction of the final STJ report reflecting the STJ's final recommendations. An order in the record signed by Chief Judge Wells, Judge Dawson, *and* STJ Couvillion provides that the Tax Court "*adopted* the findings of fact and opinion of Special Trial Judge Couvillion" and that "[t]he *only* official Memorandum Findings of Fact and Opinion" in the case was the report "filed on December 15, 1999, by Special Trial Judge Couvillion, reviewed and *adopted* by Judge Dawson, and reviewed and *approved* by former Chief Judge Cohen." *Id.* at 314a-315a (emphasis added). The order further explains that:

> Judge Dawson states and Special Trial Judge Couvillion agrees, that, after a meticulous and time-consuming review of the complex record in these cases, Judge

> Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion, that Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and that Judge Dawson gave due regard to the circumstance that Special Trial Judge Couvillion evaluated the credibility of witnesses.

Id. at 315a.

Consistent with this order, the courts of appeals *uniformly* concluded that the report attributed to STJ Couvillion in the Tax Court's opinion is his report and that its presence in the record disposed of petitioners' claims. 03-1034 Pet. App. 7a ("[W]e accept as true the Tax Court's statement that the underlying report adopted by the Tax Court was in fact Special Trial Judge Couvillion's. This renders moot all of Kanter's arguments.") (internal citations omitted); 03-184 Pet. App. 9a ("[C]ontrary to Petitioners-Appellants' assertions, the record as presented to us clearly reveals that the report adopted by the Tax Court is Special Trial Judge Couvillion's report."); *Estate of Lisle* v. *Commissioner*, 341 F.3d 364, 384 (5th Cir. 2003) (adopting this reasoning).

The express statement by STJ Couvillion and Judge Dawson that the STJ's ultimate recommended findings were adopted by the Tax Court compels rejection of petitioners' repeated claims that the STJ's "report remains secret to this day—even from this Court" (03-184 Br. 9), and that the "record fails to reflect whether the Tax Court modified or reversed its trial judge's findings" (03-1034 Br. 38). Equally baseless is the claim (03-1034 Br. 1) that the government has conceded that the STJ's findings were "revers[ed]" by the Tax Court judge. The government has consistently argued that the statement by STJ Couvillion, Judge Dawson and Chief Judge Wells refutes that contention. See 03-1034 Resp. Br. in Opp. 12; 03-184 Resp. Br. in Opp. 13 & n.3.

B. Petitioners' Claims Thus Reduce To An Impermissible Attempt To Compel Disclosure Of The Tax Court's Internal Deliberative Processes

Petitioners' request for the "original STJ report" thus boils down to a claim for any initial report that the STJ submitted to the Chief Judge of the Tax Court but later abandoned in favor of the "final" report published in the record. That request should be refused by this Court. Even assuming that such an "original" report was submitted by STJ Couvillion, that report would reflect, not his ultimate decision, but a step in his confidential decisional process.

It is well settled that litigants are not entitled to compel disclosure of a judge's or agency's pre-decisional deliberative process. *See, e.g., Fayerweather* v. *Ritch*, 195 U.S. 276, 306-308 (1904); *Chicago, Burlington & Quincy Ry.* v. *Babcock*, 204 U.S. 585, 593 (1907). See also *In re Cook*, 49 F.3d 263, 265-266 (7th Cir. 1995) ("federal judges speak through their opinions"; "[i]nquiry beneath the surface of a judge's opinion is forbidden"); *Goetz* v. *Crosson*, 41 F.3d 800, 805 (2d Cir. 1994), cert. denied, 516 U.S. 821 (1995) ("[t]he inner workings of administrative decision making processes are almost never subject to discovery. * * * Clearly, the inner workings of decision making by courts are kept in even greater confidence."); *United States* v. *Crouch*, 566 F.2d 1311, 1316 (5th Cir. 1978) (same).

This Court reaffirmed that principle in *United States* v. *Morgan*, 313 U.S. 409, 417-422 (1941) (*Morgan IV*), which involved a challenge to a rate determination by the Secretary of Agriculture. In the district court, the Secretary had been deposed and made to explain "the process by which he reached the conclusions of his order" so that the court could evaluate whether the Secretary had conducted a fair hearing. *Id.* at 422. In affirming the Secretary's determination, this Court held that "the Secretary should never have been subjected to this examination." *Ibid.* The Court explained,

"it [is] not the function of the court to probe the mental processes" of administrative or judicial decisional authorities. *Ibid.* Rather, "[s]uch an examination of a judge would be destructive of judicial responsibility. * * * Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." *Ibid.* (internal citations omitted).

Petitioners' suggestion (03-184 Br. 35-43) that STJ Couvillion's deliberative process should nonetheless be disclosed to determine whether his findings were coerced by or the result of improper collaboration with Judge Dawson represents an impermissible intrusion into the court's decision-making process.

1. Petitioners' Claim Of Improper Influence On STJ Couvillion Lacks Factual Support

Petitioners' allegation of improper influence on STJ Couvillion rests on the uniform acceptance of STJ reports by Tax Court judges (03-1034 Br. 8-10, 15-16, 21; 03-184 Br. 7-10, 16-17, 19 & n.14), a hearsay affidavit from petitioners' counsel about alleged "revisions" to STJ Couvillion's report (03-1034 Br. 6a), and surmise (03-184 Br. 9, 41-42) premised on the STJ hiring process. None of those assertions provides a sufficient basis for requiring disclosure of the Tax Court's internal deliberative process.

The tendency of STJs and Tax Court judges to agree is not probative of improper influence. Such agreement was evident prior to 1983, when under then-Tax Court Rule 182, STJ reports were served on the parties, who could then file exceptions. See Tax Ct. R. 182(b) (1974). From 1976 to 1983, for example, there were only *six* cases, out of approximately 680 decisions, in which the Tax Court did not adopt the opinion of the STJ, and only *one* case in which the Tax Court

"reversed" the STJ.[4] Thus, even when the STJ's report was available to the parties prior to the Tax Court's review, full adoption of STJ recommendations was the rule, not the exception.

The Declaration of Randall G. Dick (03-1034 Br. App. 5a-7a) also fails to demonstrate misconduct. It states only that petitioners' counsel heard that "changes to judge Couvillion's findings relating to credibility and fraud were made by Judge Dawson" in a way that constituted an "outright

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[4] See *Kansas City S. Ry.* v. *Commissioner*, 76 T.C. 1067 (1981); *Narver* v. *Commissioner*, 75 T.C. 53 (1980); *Hilton* v. *Commissioner*, 74 T.C. 305 (1980); *La Fargue* v. *Commissioner*, 73 T.C. 40 (1979); *C. Blake McDowell, Inc.* v. *Commissioner*, 67 T.C. 1043 (1977), vacated and remanded, 576 F.2d 718 (6th Cir.), on remand, 71 T.C. 71 (1978), aff'd, 652 F.2d 606 (6th Cir. 1980). In 14 (out of approximately 680) other cases, the Tax Court adopted the opinion of the STJ with modifications that were, in most instances, described as "minor." See *Ocean Sands Holding Corp.* v. *Commissioner*, 41 T.C.M. (CCH) 1, 2 (1980) ("minor modifications"), aff'd, 701 F.2d 163 (4th Cir.) (Table), cert. denied, 464 U.S. 827 (1983); *Taylor* v. *Commissioner*, 41 T.C.M. (CCH) 539, 539 (1980) ("some modifications"); *Perrett* v. *Commissioner*, 74 T.C. 111, 111 (1980) ("minor modifications"), aff'd, 679 F.2d 900 (9th Cir. 1982) (Table); *Karme* v. *Commissioner*, 73 T.C.M. 1163, 1163 (1980) ("minor modifications"), aff'd, 673 F.2d 1062 (9th Cir. 1982); *Freidus* v. *Commissioner*, 39 T.C.M. (CCH) 740, 740, (1979) ("some amendments"); *McKinley* v. *Commissioner*, 37 T.C.M. (CCH) 1769, 1769 (1978) ("minor modifications"); *Estate of Thurner* v. *Commissioner*, 37 T.C.M. (CCH) 981, 982 (1978) ("modified in minor respects"); *Ward* v. *Commissioner*, 37 T.C.M. (CCH) 928, 928 (1978) ("minor changes"); *Dante* v. *Commissioner*, 37 T.C.M. (CCH) 556, 556 (1978) ("minor modifications"); *Estate of Marcello* v. *Commissioner*, 36 T.C.M. (CCH) 1408, 1409 (1977) ("minor changes"); *Jacqueline, Inc.* v. *Commissioner*, 36 T.C.M. (CCH) 1363, 1363 (1977) ("[s]ome modifications"), modified, 37 T.C.M. (CCH) 937 (1978); *Ducar* v. *Commissioner*, 36 T.C.M. (CCH) 1278, 1279 (1977) ("minor changes"); *Graham* v. *Commissioner*, 35 T.C.M. (CCH) 1315, 1316 (1976) ("minor modifications"); *Louisville & Nashville R.R.* v. *Commissioner*, 66 T.C. 962, 963 (1976) ("some amendments"), aff'd in part, rev'd in part and remanded, 641 F.2d 435 (6th Cir. 1981).

rejection of credibility findings" initially proposed by the STJ. *Id.* at 6a. Even assuming arguendo the truth of those hearsay statements, whether Judge Dawson suggested "revisions" is of no moment so long as STJ Couvillion ultimately agreed with and adopted those changes in his report. The order signed by, *inter alia*, STJ Couvillion should end any speculation about whether his report might have been "revised" without his consent, because it flatly states that his report was adopted by Judge Dawson. 03-184 Pet. App. 315a.

Finally, petitioners cannot raise the specter of impropriety by claiming that STJs are hired and fired by regular Tax Court judges (03-184 Br. 9, 41-42). STJs *cannot* be hired or fired by the regular judges to whom they report, but are salaried, full-time employees appointed solely by the Chief Judge. See 26 U.S.C. 7443A(a); Tax Ct. R. 180. There is nothing in the record, or indeed the entire history of the Tax Court, to suggest that STJ Couvillion (or any other STJ) has ever been threatened with termination or otherwise improperly coerced into adopting a view of the case advanced by the regular Tax Court judge but contrary to his own views. Nor is there any basis for concluding that any STJ would acquiesce in the face of such conduct.

2. As A Matter Of Law, Judicial Misconduct Will Not Be Presumed

Beyond those factual deficiencies, petitioners' suggestion of misconduct in the Tax Court's deliberative process is legally flawed for two reasons. First, petitioners' attempt to require disclosure of the Tax Court's internal deliberative process in order to *discover* whether any improprieties have occurred turns the standard assumption about judicial conduct on its head. Courts should not be "inclined to assume" nefarious conduct on the part of judges, but should accept a judge's claim that he has performed his judicial responsibilities absent "proof" by a challenging party to the contrary.

Freytag v. *Commissioner*, 501 U.S. 868, 872 n.2 (1991). Cf. *Erhard* v. *Commissioner*, 46 F.3d 1470, 1476 (9th Cir. 1995); *Richardson* v. *Town of Eastover*, 922 F.2d 1152, 1161 (4th Cir. 1991). Thus, where a judge denies the factual basis for a recusal claim, the denial ends the matter. *E.g.*, *Sao Paulo State of Federative Republic of Brazil* v. *American Tobacco Co.*, 535 U.S. 229, 233 (2002) (crediting judge's rendition); *In re Brooks*, No. 03-5047, 2004 WL 2032521, at *6 (D.C. Cir. Sept. 14, 2004) (same). Similarly, where a judge's partiality is questioned, the claim is examined "in light of the facts" set forth in the judge's report, "and not as they were surmised or reported" erroneously by those not present. *Cheney* v. *U.S. Dist. Court*, 124 S. Ct. 1391, 1392 (2004) (Scalia, J.).

Accordingly, the proper starting point in this case is the order signed by STJ Couvillion, Judge Dawson and the Chief Judge Wells. That order states that Judge Dawson "adopted the findings of fact and opinion of Special Trial Judge Couvillion" and gave "due regard" to the STJ's recommendations. 03-1034 Pet. App. 102a; 03-184 Pet. App. 315a. If those statements were incorrect, the STJ would "say so," and neither he nor Chief Judge Wells nor Judge Dawson would have signed the order. 03-1034 Pet. App. 13a. For the same reason, the numerous Tax Court opinions that, like the decision below, begin "the Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below," should be taken at face value.

Second, to the extent petitioners' claim is merely that STJs and Tax Court judges collaborate in a way that allows a Tax Court judge to influence an STJ recommendation before the STJ finalizes it, their claim lacks legal merit. There is simply no legal prohibition against judges exchanging ideas, or even vigorously lobbying one another, in an attempt to influence the decision-making process. To the contrary, judges routinely "confer[] with one another about cases assigned to them," and sometimes change their minds about

a case as a result of those consultations. 03-1034 Pet. App. 13a-14a. Because "votes are not final until decisions are final; and decisions do not become final until they are released, accompanied by an explanation of the reasons for the result," the mere fact that "the exchange of draft opinions can and does change votes" does not violate due process. *Checkosky* v. *SEC*, 23 F.3d 452, 489-490 (D.C. Cir. 1994). While that kind of back and forth between judges is most familiar in the context of judges jointly hearing a case as a panel, nothing precludes such interchange between the STJ and a Tax Court judge in light of the particular structure of decisionmaking reflected in Rule 183. See pp. 24-29, *infra*.

The exchange of drafts and ideas between an STJ and a regular judge of the Tax Court similarly is not forbidden "ex parte" communication. See 03-184 Br. 9-10, 36-40. Indeed, the assertion is wrong by definition, because neither the Tax Court judge nor the STJ is a "party" in the case. See *Black's Law Dictionary* 597 (7th ed. 1999) (defining "ex parte" as "[d]one or made at the instance and for the benefit of one party only"). To be sure, where different employees of an agency perform investigatory, prosecutorial, and adjudicative responsibilities, those employees with investigative and prosecutorial duties will generally not have a role in the adjudicative process. See 5 U.S.C. 554(d)(2); *Morgan* v. *United States*, 304 U.S. 1, 19-20 (1938) (*Morgan II*). Tellingly, however, there is no such prohibition against confidential communications between an agency head, who serves as the final agency adjudicator, and a hearing examiner regarding a pending adjudicative matter. Congress expressly *exempted* such communications from the prohibition against prosecutorial contacts. 5 U.S.C. 554(d)(2)(C).

This Court acknowledged the practice of confidential communication between decisional authorities and hearing officers in *Morgan IV*. The parties challenging the Secretary of Agriculture's rate determination in that case

asserted *inter alia* that "the Secretary * * * conferred on several different occasions with the Examiner concerning the evidence and the findings to be made thereon out of the presence of appellee market agencies and their counsel," that the Examiner was "an employee dominated by the Secretary," and that the Secretary effectively "told the Trial Examiner which way the Secretary would like the case to go upon the merits." Br. for Appellees at 58, 109, 113, *United States* v. *Morgan*, 313 U.S. 409 (1941) (No. 640). The Court likewise noted that the Secretary had "held various conferences with the examiner who heard the evidence" (313 U.S. at 422), but stated that he had "dealt with the enormous record in a manner not unlike the practice of judges in similar situations." *Ibid.* The Court upheld the Secretary's decision, concluding that "[t]he record leaves no doubt that the Secretary * * * appropriately discharged [his] duty." *Id.* at 415.

3. Disclosure Of An "Original" Report Could Not Benefit Petitioners Absent Further Unacceptable Intrusions Into The Tax Court's Deliberative Process

Allowing petitioners to obtain access to an "original," but subsequently abandoned, STJ report would lead only to more demands for intrusion into the Tax Court's deliberative process. Mere disclosure of such an original report could not in itself provide any basis for granting petitioners relief from the judgment of the Tax Court, because the record is clear that STJ Couvillion's final recommendations regarding the disposition of this case are embodied *in toto* in the decision of the Tax Court. The Tax Court judge did not reverse, modify, or set aside those recommendations, and thus there would be nothing of relevance to be considered by the courts of appeals even if petitioners could establish that the STJ changed his views over the course of the deliberative process. That a judge changed his mind before adopting his

final view of a case is hardly grounds for setting aside a final judgment. Indeed, the courts below have *already held* that proof of such a change of mind would not invalidate the Tax Court's judgment; the mere disclosure of any abandoned "original" report would thus avail petitioners nothing. 03-184 Pet. App. 9a-10a ("Whether Special Trial Judge Couvillion prepared drafts of his report or subsequently changed his opinion is entirely without import."); 03-1034 Pet. App. 13a ("Any differing preliminary recommendations—if they ever existed—would no longer be constitutionally relevant because the STJ has abandoned them.").

In order to have any prospect of obtaining relief from the judgment of the Tax Court, therefore, petitioners could not be content with the mere disclosure of an "original" report. Instead, petitioners would have to pursue still further discovery in an effort to identify some evidentiary basis for their allegations that STJ Couvillion did not in fact agree with the findings set forth as his report in the decision of the Tax Court. In short, petitioners would need to reconstruct the entire internal deliberative process, presumably by requests to depose STJ Couvillion and Judge Dawson.

Far from being a requirement of due process, subjecting judges to examination to learn about their decisional process has never been countenanced by this Court. See *Morgan IV*, 313 U.S. at 422; *Fayerweather*, 195 U.S. at 306-307. The first step toward that examination should not be taken here. Petitioners' claims should be rejected—or the writs of certiorari should be dismissed as improvidently granted—because even a ruling in petitioners' favor on the questions presented could not change the final disposition below in the absence of still further, and patently impermissible, discovery of the Tax Court's internal deliberations.

II. THE TAX COURT'S PROCEDURES COMPORT WITH DUE PROCESS

Petitioners contend that non-disclosure of an "original" STJ report precludes effective appellate review, departs from historical and contemporary judicial practice in violation of due process, and violates *Mathews* v. *Eldridge*. Even if presented by this case, those arguments would lack merit.

A. Disclosure Of An "Original" STJ Report Is Unnecessary For Effective Appellate Review

Petitioners' arguments concerning effective appellate review assume that an STJ functions as a trial court judge whose factual recommendations must be accepted absent "clear error." Thus, petitioners claim, STJ reports must be disclosed so that the courts of appeals can consider whether the Tax Court properly applied the "clearly erroneous" standard of review in rejecting any findings recommended by the STJ. That argument fundamentally misunderstands the function and responsibilities of STJs.

1. The Tax Court Judge, Not The STJ, Determines Facts And Legal Conclusions

In cases such as this, tried pursuant to Section 7443A(b)(4) of the Internal Revenue Code, STJs are simply not authorized to function as trial court judges whose findings are reviewable only for clear error. By statute, STJs are precluded from entering the "decision of the Tax Court" as to either fact or law in proceedings of the type at issue here. See 26 U.S.C. 7443A(c). In *Freytag* v. *Commissioner*, 501 U.S. 868, 873-876 (1991), this Court settled the question, holding that STJs "ha[ve] no authority to decide a case assigned [to them] under subsection (b)(4)" of Section 7443A. *Id.* at 875 n.3. The "authority actually to decide those cases * * * is reserved *exclusively* for judges of the Tax Court." *Id.* at 874 (emphasis added).

Consistent with that statutory mandate, the Tax Court's rules confer decisional authority only on the regular judge of the Tax Court when a case is heard by an STJ under Section 7443A(b)(4). Rule 183(c) provides that the judge "may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions." Tax Ct. R. 183(c); see 26 U.S.C. 7443A(c). Thus, the only decision relevant for appellate review is the decision of the Tax Court. 26 U.S.C. 7443A(c), 7460(b); see 03-1034 Pet. App. 8a ("The Tax Court thus acts as the original finder of fact.").

2. The Tax Court Is Not Required By Its Rules To Review STJ Reports For Clear Error

Petitioners' contrary argument (e.g. 03-184 Br. 22-23, 31-32; 03-1034 Br. 4-5, 17-18, 19-20) derives from their misreading of Tax Court Rule 183(c) to require review of STJ reports under the "clear error" standard or a similarly deferential standard of review. As explained in Part I above, the standard-of-review issue is not presented in this case, because the record demonstrates that the Tax Court judge did not reverse or set aside, but instead accepted, the STJ's recommended findings. In any event, petitioners are mistaken; far from requiring clear-error review, current Tax Court Rule 183 eliminated any sort of appellate-style review from proceedings within the Tax Court.

The current Tax Court Rule 183(c), which was adopted in 1983, provides:

> The Judge to whom or the Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may

> recommit the report with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

Tax Ct. R. 183(c). In contrast, Rule 183's predecessor, Rule 182, had (since 1974) contained similar language concerning "due regard" and the presumed correctness of STJ reports, but also required STJs to "serve[]" their reports, "including" any "findings of fact and opinion," on the parties and provide the parties an opportunity to file briefs with the Tax Court setting forth their "exceptions" to the report, and to request argument on the issues so briefed. Tax Ct. R. 182(a), (b), (c) and (d) (1974). In 1983, the Tax Court amended the rule to its current form, "delet[ing]" "[t]he prior provisions for service of the Special Trial Judge's report on each party and for the filing of exceptions to that report." Tax Ct. R. 183 note (1984).

By altering its rules specifically to *eliminate* disclosure of and exceptions to STJ reports, the Tax Court has made plain that it does not contemplate any sort of appellate-style review of STJ reports. See *Freytag* v. *Commissioner*, 904 F.2d 1011, 1015 n.8 (5th Cir. 1990) (observing that rule change "confirm[ed] that the Tax Court's relationship with its special trial judges cannot be analogized to typical appellate review"), aff'd, 501 U.S. 868 (1991). Although Rule 183(c) continues to instruct Tax Court judges to give "due regard" to the "circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses," and "presume[]" STJ findings "to be correct," that language does not require review of STJ reports for clear error. Instead, it merely requires Tax Court judges "to be cognizant that the STJ had the opportunity to evaluate the credibility of witnesses." 03-1034 Pet. App. 8a. On this point, even the sole dissenting judge in the proceedings below

agreed. *Id.* at 75a (Cudahy, J., concurring in part and dissenting in part) ("Rule 183 imposes no requirement of disclosure or of clearly erroneous deference upon the Tax Court").

Ascribing a deeper meaning to the "due regard" and "presumed to be correct" language would not comport with the Tax Court note explaining the addition of that language in 1974. The note provides that the amendment was intended to *expand* the decisional authority of Tax Court judges with respect to STJ reports, stating that "[t]he decision of a case is made by a Judge, and the rule *expands* the alternatives available in reviewing the determinations of the commissioner as embodied in his report. The Judge, to whom the case is assigned, may take *any* action he deems appropriate for a proper disposition of the case, *even with respect to the commissioner's findings of fact*, although they are accorded special weight insofar as those findings are determined by the opportunity to hear and observe the witnesses." Tax Ct. R. 182(b) note (1974) (emphasis added).[5] Thus, notwithstanding the "due regard" and "presumed correct" language, the Tax Court intended to retain full decisional authority over cases under the new rule.

The Tax Court's own interpretation of its procedures bolsters that reading of Rule 183. In *Rosenbaum* v. *Commissioner*, 45 T.C.M. (CCH) 825, 827 (1983), the Tax Court was asked to consider whether it had given the deference required under former Rule 182 to an STJ report. The court

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[5] Petitioners argue (03-1034 Br. 31) that a reference in this note to "Court of Claims procedures" demonstrates the Tax Court's intent to review reports for clear error, as that was the existing practice of the Court of Claims when former Rule 182 was adopted. But the note, by its terms, does not suggest an intent to *duplicate* the Court of Claims' standards of review; it provides only that the Tax Court's procedures should be "*more comparable* to those which obtain in the Court of Claims." Tax Ct. R. 182 note (emphasis added).

observed that while its rules required it to give "due regard to the circumstance that the Special Trial Judge had the opportunity to see and evaluate the credibility of witnesses," "the presumptive correctness of the Special Trial Judge's report does not impair nor dilute our duty of bearing the ultimate responsibility for determining matters before us." *Ibid.*

Petitioners' reliance on *Stone* v. *Commissioner*, 865 F.2d 342 (D.C. Cir. 1989), rev'g *sub nom. Rosenbaum* v. *Commissioner*, 45 T.C.M. (CCH) 825, 827 (1983) (03-1034 Br. 7 n.2, 28-34; 03-184 Br. 17, 22, 27-28), for a contrary interpretation of the "due regard" language is misplaced.[6] In *Stone*, the D.C. Circuit held that the Tax Court was required under former Tax Court Rule 182 to review the recommended findings of STJs under a clearly erroneous standard. 865 F.2d at 345-347.

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[6] Kanter errs in asserting (Br. 32) that the government has conceded the validity of the *Stone* decision. The government has long regarded *Stone* as wrongly decided in light of the D.C. Circuit's failure to defer to the Tax Court's interpretation of its own rule. See Resp. Br. at 19 n.10, *Freytag* v. *Commissioner*, *supra*. Indeed, shortly after *Stone* was decided, the government explained its view of the case as follows:

> the Tax Court has never retreated from the position it took in *Rosenbaum* that "the presumptive correctness of the Special Trial Judge's report does not impair nor dilute our duty of bearing the ultimate responsibility for determining matters before us." *Rosenbaum*, 45 T.C.M. (CCH) at 827. In accordance with that position, the Tax Court no longer furnishes litigants a copy of the special trial judge's report, nor does it invite the parties to file exceptions to the report. *Ibid.*; Pet. App. A8 n.8. As the court of appeals concluded, "this change in rules, in our view, confirms that the Tax Court's relationship with its special trial judges cannot be analogized to typical appellate review." *Ibid.* No court has held to the contrary since the change in the Tax Court's practice.

Ibid.

Given that *Stone* was decided under former Rule 182, which contained the service-and-objection requirement, it is inapposite here. By eliminating the service-and-objection procedures, the Tax Court has removed any ambiguity over whether STJs function like trial court judges subject to appellate-style review by Tax Court judges. *Freytag*, 904 F.2d at 1015 n.8. Thus, those courts considering the validity of *Stone* since the Tax Court adopted Rule 183(c) have uniformly concluded that it does not mandate review of STJ findings by the Tax Court for clear error. See *ibid.*; 03-1034 Pet. App. 8a-9a ("The Tax Court thus acts as the original finder of fact. * * * [T]he STJ's inability to decide cases limits the amount of deference that the Tax Court, as the original factfinder, must pay to those preliminary findings."); *id.* at 75a (Cudahy, J., concurring in part, dissenting in part) ("Rule 183 imposes no requirement of disclosure or of clearly erroneous deference upon the Tax Court."); accord *Estate of Lisle* v. *Commissioner*, 341 F.3d 364, 384 (5th Cir. 2003).[7]

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[7] Even if the Court were to conclude that the 1983 amendment to Rule 183 is problematic because of tension between the non-disclosure rule and the "due regard" and "presumed to be correct" language, the proper remedy would not be to compel disclosure of "original" STJ reports. The Tax Court eliminated the practice of disclosing STJ reports, and the "due regard" and "presumed to be correct" language can be construed as internal direction to guide the Tax Court judges in considering STJ reports. But if that language were inherently to give rise to rights in the taxpayer, that language should give way to the Tax Court's clear intent to eliminate disclosure and briefing. Nothing in the Constitution or the Internal Revenue Code required the Tax Court to retain the provisions regarding deference to STJ recommendations. Thus, if the Tax Court's failure to delete the "due regard" and presumption language in 1983 cannot be reconciled with the court's non-disclosure rule, the proper result would be to invalidate the offending language in the rule, not to reject the Tax Court's clear policy decision to preserve the confidentiality of initial STJ reports. At the very least, a remand to the Tax Court would be required to permit that court to decide the question of severability that would be raised in those circumstances. Cf. *Davis* v. *Michigan Dep't of Treasury*,

B. The Tax Court's Practice Is Neither Unprecedented Nor Unjustified

Petitioners contend (03-1034 Br. 17, 23-24; 03-184 Br. 17, 43- 46) that disclosure of initial STJ reports is required by virtue of historical and contemporary judicial and administrative practice. *Ibid.* (citing *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994)). Those contentions are incorrect.

As an initial matter, petitioners overlook the well-established principle that the procedures followed in the Article III context generally do not define the proper benchmark for evaluating tax proceedings, because such proceedings do not require the full complement of procedural safeguards that may be necessary elsewhere. At common law, tax cases were resolved in a branch of the "court of exchequer" and were not "judicial controversies * * * according to the ordinary course of the common law or equity." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 282 (1855). The Exchequer was a "department" in which "a court of revenue [was] held before the Treasurer," and which was "probably the nearest approach to a body of administrative law that the English legal system has ever known; and the court of Exchequer, sitting as a court of Revenue, is the nearest approach to an administrative court." 1 W. Holdsworth, *A History of English Law* 231, 238, 239 (1926). See A. Carter, *A History of the English Courts* 51 (7th ed. 1944).

Indeed, this Court has concluded that tax cases are "public rights" cases, which "congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*,

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489 U.S. 803, 818 (1989); *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 822 (1973).

458 U.S. 50, 68, 70 n.23 (1982) (as to matters involving "public rights," a category of cases that includes "taxation," Congress "would be free to commit such matters completely to nonjudicial executive determination"); *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). Accordingly, it has long been recognized that tax disputes may be subject to unique procedures that might otherwise be impermissible in the Article III context. See *Murray's Lessee*, 59 U.S. (18 How.) at 284. That principle follows from the fact that "the very existence of government depends upon the prompt collection of the revenues." *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 n.18 (1977).

In any event, petitioners are wrong in characterizing the Tax Court's practice as unique or aberrational. Most saliently, there is a direct *statutory* analog to the Tax Court's STJ practice: the non-disclosure of a regular Tax Court judge's opinion when a case is reviewed by the full Tax Court. From the earliest days of the Tax Court's predecessor, Congress has provided that initial reports reflecting the proposed disposition of a case were subject to review by the full court, and when that option is exercised Congress has *required* the exclusion of the "original" report from the record. See Revenue Act of 1928, ch. 852, § 601, 45 Stat. 871. That historical practice continues today with Section 7460(b) of the Internal Revenue Code, which directs that, in cases of full court review, the report of the regular judge "shall not be a part of the record." 26 U.S.C. 7460(b); see *Estate of Varian* v. *Commissioner*, 396 F.2d 753, 754-755 (9th Cir.) (rejecting argument that due process requires inclusion of the regular judge's opinion in the record), cert. denied, 393 U.S. 962 (1968); *Heim* v. *Commissioner*, 251 F.2d 44, 45-46 (8th Cir. 1958) (same).

Outside the tax context, the numerous boards of contract appeals established by various agencies similarly do not require disclosure of initial reports prepared by presiding

judges and submitted to other judges for final decision. Under the Contract Disputes Act, 41 U.S.C. 601 *et seq.*, administrative agencies are authorized to establish boards of contract appeals to resolve certain contract disputes between the agency and contractors. See 41 U.S.C. 607. Such boards are typically comprised of a chairperson and several administrative judges. The chairperson typically assigns a case to a panel of administrative judges, one of whom is designated the "presiding judge" responsible for conducting any evidentiary hearing. The presiding judge's initial proposed decision and credibility assessments are not disclosed to the parties or reviewed only for clear error by the other panel members. Only the panel's final decision is served on the parties and included in the record.[8] As with STJ reports, the recommendations of a presiding judge who hears the evidence firsthand can be rejected by the other judges on the panel, who review only the record and the presiding judge's proposed disposition. *E.g. Lockheed Martin Tactical Def. Sys., Inc.*, Contract No. N00039-86-C-0452, 2000 WL 626879, at n.1 (Armed Serv. Bd. Cont. App. May 3, 2000) (rejecting credibility assessments of presiding judge); *Appeal of Ash Anlagen-Und Sanierungstechnik GMBH*, Contract No. DAJA76-87-C-0467, 2003 WL 22230677 (Armed Serv. Bd. Cont. App. Sept. 24, 2003) (same); *Smith & Oby Co.* v. *General Servs. Admin.*, No. 15336, 2003 WL 22100648 (Gen. Servs. Admin. Bd. Cont. App. Sept. 5, 2003) (retirement of presiding judge prior to decision). That system of non-disclosure and non-deference to the hearing officer's

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[8] *E.g.*, Gen. Servs. Admin. Bd. Cont. App. R. 101(e) ("Each case will be assigned to a panel consisting of three judges, with one member designated as the panel chairman. * * * The panel chairman is responsible for processing the case, including scheduling and conducting proceedings and hearings."), 122(c) (the "Board" determines "the credibility to be accorded to witnesses"), 129 (parties provided with only decision of board). See also 7 C.F.R. 24.2, 24.3, 24.21; 38 C.F.R. 1.781, 1.783.

recommendations is accepted practice because the full panel, not the presiding judge, is understood to render decision. See *Bill J. Copeland*, No. 2003-124-R, 2003 WL 1740503 (Dep't of Agriculture Bd. Cont. App. Feb. 20, 2003) (rejecting request for rehearing after retirement of presiding judge on the ground that "[a] presiding judge has no greater say in the outcome of an appeal than the other members"); *Charles G. Williams Constr.* v. *White*, 326 F.3d 1376, 1381 (Fed. Cir. 2003) (rejecting argument that presiding judge is "particularly well qualified" to evaluate credibility as sole officer hearing witnesses).

The counter-examples offered by petitioners (03-1034 Br. 23- 24; 03-184 Br. 39-40), such as the procedures governing ALJs and magistrate judges, are inapposite. In the first place, that Congress has chosen to mandate disclosure of initial recommended decisions in those contexts is no basis for extending the same requirement to other settings. By expressly precluding disclosure of "reviewed" decisions of Tax Court judges (26 U.S.C. 7460(b)), Congress has signaled that it sees no constitutional objections to proceeding in that manner. In the same way, by granting exclusive rulemaking authority to the Tax Court (26 U.S.C. 7443A(a), 7453), Congress has empowered that court, at a minimum, to choose between the two ways of treating initial opinions that Congress has found advisable in different contexts.

Petitioners' examples are, in any event, inapt. By statute, an ALJ's recommended decision *automatically* "becomes the decision of the agency" unless a party objects, without any review whatsoever by the ultimate agency decisionmaker. 5 U.S.C. 557(b).[9] Given that fact, it is unsurprising that Con-

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[9] Unless a party interposes an objection, the factual recommendations of a magistrate judge can automatically be made the findings of the court without further review by the district judge. See 28 U.S.C. 636(b)(1)(A); *Thomas* v. *Arn*, 474 U.S. 140, 148-152 (1985); see also Fed. R. Civ. P. 53(g)(3) (special masters); *Kentucky* v. *Indiana*, 474 U.S. 1, 1 (1985) ("The

gress has required that ALJ decisions be disclosed, thereby giving parties the opportunity to invoke review by the final agency decisionmaker. See 5 U.S.C. 557(c). STJ reports do not operate in the same manner, because Congress has statutorily *precluded* STJs from functioning as decisionmakers in this context. See 26 U.S.C. 7443A(b)(4) and (c); *Freytag*, 501 U.S. at 875 n.3.[10]

Even if the Tax Court's practices lacked historical pedigree or modern analog, they would not be unconstitutional simply by virtue of their supposed novelty. Courts often adopt procedures without historical precedent to respond to the unique demands of the day, such as class action suits, multi-district litigation, and even the merger of courts of equity and courts of law. The Tax Court itself is a relatively modern innovation that responded to the perceived need for a tribunal in which taxpayers could quickly and easily settle their disputes before paying a disputed tax. The Tax Court's practices are a reflection of its special role as an informal, nationwide tribunal for the efficient resolution of taxpayer claims.

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parties having waived the right to file Exceptions, the Report [of the Special Master] is adopted."). In any event, the magistrate and special-master examples are inapposite because they arise in the Article III context, where the Constitution imposes constraints on the utilization of adjunct decisionmakers.

[10] Petitioners' reliance on *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 493 (1951), for the proposition that disclosure of a hearing examiner's report is necessary "to accurate appellate adjudication" (03-1034 Br. 35; see 03-184 Br. 25) is misplaced. The statutes at issue in *Universal Camera* required that the hearing examiner include his report in the record, and "the plain language of the statutes direct[ed] a reviewing court to determine the substantiality of evidence on the record including the examiner's report." *Universal Camera*, 340 U.S. at 493 (citing the Taft-Hartley Act, ch. 120, § 10(c), 61 Stat. 148, and the Administrative Procedure Act, ch. 324, § 8(b), 60 Stat. 242; see 5 U.S.C. 557(c)). No such statutes apply here.

As one commentator on Rule 183(c) has observed, the Tax Court is unique in that it is a single nationwide court that "speaks with a single voice" while expeditiously resolving cases among 19 judges who still ride circuit. A. Madison, *Revisiting Access to the Tax Court's Deliberative Process*, Tax Notes, May 10, 2004, at 751. Imposing an appellate-style review process on the court would add an unnecessary layer of decision to the detriment of the quick and easy resolution of Tax Court proceedings. *Ibid.*

Indeed, while the Tax Court did not set forth its rationale for amending its rules in 1984 to preserve the confidentiality of STJ reports, the events of the time strongly suggest that the amendment was necessary to the expeditious resolution of cases. Congress made major revisions to the Internal Revenue Code that increased taxpayer liability for abusive tax shelters, and in early 1983, then-Tax Court Chief Judge Designate Tannenwald warned that he "anticipated increases in the number of shelter and tax protester cases * * * from the newly enacted provisions of the Internal Revenue Code." *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1984: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 98th Cong., 1st Sess. Pt. 4, at 8 (1983) (FY 1984 Hearings). In fact, the Tax Court was quickly flooded with tax shelter petitions; the number of cases filed with the court doubled from 1980 to 1985, increasing nearly 50% from fiscal years 1982 to 1985 alone. See *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1987: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 99th Cong., 2d Sess. Pt. 4, at 355, 380 (1986). The court's backlog of pending cases increased at a similar rate: between fiscal years 1982 and 1985, the number of authorized Tax Court judges remained steady at 19, while the number of pending cases increased by more than 38%. *Id.* at 361; see FY 1984 Hearings at 49; 26 U.S.C. 7443.

Faced with that anticipated flood of litigation, the Tax Court removed the disclosure and objection provisions when it promulgated Rule 183, and eliminated the unnecessary layer of additional briefing and argument the court had previously permitted.

This reading of history is supported by a similar amendment to the Tax Court's rules that occurred only a few years before the disclosure provisions were eliminated entirely in 1984. In 1976, the Tax Court eliminated the service-and-objection requirement in STJ cases that did not fall within the court's "small tax case" docket but involved amounts under $2500, at a time when it was facing a surge in such cases. The court explained that the increasing "number of new cases filed in the United States Tax Court * * * involving deficiencies under $2,500" required it "to make changes in the present practices of the Court in order to dispose of pending cases more promptly and efficiently." Tax Ct. General Order No. 5, at 1 (Oct. 1, 1976). To that end, in all such cases the court permitted STJs to submit a report for decision directly to the Chief Judge of the Tax Court, without disclosure of the report to the parties and without an opportunity for the parties to object to the report. *Id.* at 1-2. In the court's view, it was "clearly impracticable and undesirable to follow the post-trial procedures" regarding STJ reports in those cases. *Id.* at 2. It is reasonable to infer that the Tax Court was motivated by the same logic when it eliminated the same procedures from the remaining cases tried before STJs a few years later.

C. Deference To An STJ's Credibility Determinations Is Not Constitutionally Compelled

Contrary to petitioners' claim (03-184 Br. 17-19, 29-34, 36, 40-41; 03-1034 Br. 38), disclosure of the STJ's initial credibility assessments is not necessary to prevent the Tax Court from rejecting them "without seeing and hearing the wit-

ness" in violation of *United States* v. *Raddatz*, 447 U.S. 667, 681 n.7 (1980).

At the outset, even if Tax Court judges were engaged in such a practice, it would raise no constitutional concern here. The suggestion in *Raddatz* that a judge's rejection of a magistrate's credibility determinations without hearing the witnesses "could well give rise to serious questions" was made in the context of a *criminal* proceeding, 447 U.S. at 681 n.7, which requires an Article III forum and a higher level of procedural protection than is required in civil tax cases. See *Moyer* v. *Peabody*, 212 U.S. 78, 84 (1909) ("[D]ue process of law depends on circumstances. * * * Thus summary proceedings suffice for taxes, and executive decisions for exclusion from the country.") (citing *Murray's Lessee*, 59 U.S. (18 How.) at 282); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 575 n.22 (1996) (observing that "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases") (internal citation omitted).

Far from requiring non-Article III courts to accept the factual determinations of hearing examiners, this Court has rejected claims that due process requires a non-Article III decisional authority to defer to a hearing officer or rehear the evidence firsthand. Thus, in *Morgan* v. *United States*, 298 U.S. 468, 481 (1936) (*Morgan I*), this Court concluded that the Secretary of Agriculture could, consistent with due process, enter factual findings after reviewing only a cold record containing evidence received by a hearing examiner:

> Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. * * * The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them.

Id. at 481-482.

Similarly, in *NLRB* v. *Mackay Radio & Telephone Co.*, 304 U.S. 333, 350-351 (1938), the Court concluded that due process was not violated by the NLRB's issuance of its own findings and conclusions in a case heard by a trial examiner, even though the Board failed "to follow its usual practice of the submission of a tentative report by the trial examiner and a hearing on exceptions to that report." *Id.* at 350. The court reasoned that so long as "the issues and contentions of the parties were clearly defined and * * * no other detriment or disadvantage is claimed," the parties receive a "full and adequate hearing" within the meaning of the Due Process Clause by the deciding body's review of the cold record. *Id.* at 350-351.

Ballard attempts (Br. 32) to sidestep the clear import of *Morgan I* and *Mackay* by characterizing the proceeding below as "a fraud case." While the imposition of a fraud penalty was at issue here, the proceedings involved solely civil liability under the Internal Revenue Code, and there has been no argument that those penalties are so substantial as to constitute a quasi-criminal penalty. Accordingly, what rule might apply in a criminal case is not at issue here.

In any event, *Raddatz* does not compel the conclusion that the Tax Court's procedures violate due process. In *Raddatz*, this Court considered whether a district court judge could review de novo the credibility assessments of a magistrate judge who had conducted a suppression hearing in a criminal trial. 447 U.S. at 678-681. The Court held that although "courts must always be sensitive to the problems of making credibility determinations on the cold record," *id.* at 679, the Constitution does not preclude de novo review as long as the reviewing court may rehear evidence when making a credibility determination. Such a statutory scheme "includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the

witnesses itself." *Id.* at 680-681. In a subsequent case, the Court confirmed that "[t]he principal constitutional argument advanced and rejected in *Raddatz* was that the omission of a requirement that the trial judge must hear the testimony of the witnesses whenever a question of credibility arises violated the Due Process Clause of the Fifth Amendment. Petitioner has not advanced a similar argument in this case, no doubt because it would plainly be foreclosed by our holding in *Raddatz*." *Peretz* v. *United States*, 501 U.S. 923, 937 (1991).

Tax Court Rule 183 provides precisely the protection deemed sufficient in *Raddatz*, because it authorizes Tax Court judges to "receive further evidence" and "direct the filing of additional briefs" at their discretion. Tax Ct. R. 183(c). Accordingly, the Tax Court's procedures, on their face, satisfy the command of *Raddatz*.

D. Disclosure Is Not Required By *Mathews* v. *Eldridge*

Disclosure of STJ reports is not, contrary to petitioners' claim (03-1034 Br. 17, 25-27; 03-184 Br. 17, 47-48), independently required by *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which requires a balancing of "the private interest that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures used," "the probable value, if any, of additional or substitute procedural safeguards," and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

Petitioners were afforded extensive pre-deprivation process: They received notice of the government's claim; a public hearing prior to the government's assessment of tax liability; an opportunity to present evidence during a trial that generated almost 5,500 pages of transcript, more than 4,600 pages of briefs, and thousands of exhibits consuming

hundreds of thousands of pages in the record (03-1034 Pet. App. 3a); a published opinion detailing the Tax Court's reasons for decision, including the factual findings and legal conclusions ultimately recommended by the STJ; and an opportunity to appeal the Tax Court's decision to the federal courts of appeals. In addition, petitioners had the option, which they chose not to exercise, of litigating this dispute in an Article III court by paying the disputed tax and filing a refund action in federal district court.

This process more than satisfies the *Mathews* balancing test. The "private interests" affected by non-disclosure, namely the alleged risk of an "erroneous deprivation" of an individual's funds, are insignificant in light of the extensive hearing petitioners received under the Tax Court's rules. Indeed, this Court held in *Morgan I*, 298 U.S. 468, that a litigant's private financial interest in a civil case does not require an examiner even to prepare a written report, because the litigant's interests are amply protected by the underlying hearing. It follows that such reports need not be disclosed to protect the taxpayers' interests if they are, in fact, prepared. That is particularly true where, as here, the Tax Court judge has adopted the final recommendations of the STJ in full.

In contrast, the government's interest in retaining the current system is substantial. As explained earlier, the broader policy of refusing to disclose non-final reports and other aspects of the deliberative process is vital to the proper functioning of the Tax Court. See pp. 16-17, *supra*. Non-disclosure also eliminates an additional layer of unnecessary and time-consuming review and thus enhances the Tax Court's ability to resolve cases efficiently and to speak with one voice. See pp. 34-36, *supra*. Finally, the government has a substantial interest in tax collection procedures generally, because collection of taxes is "the exercise of a sovereign prerogative, incident to the power to enforce the

obligations of the delinquent taxpayer himself, * * * grounded in the constitutional mandate to 'lay and collect taxes.'" *United States* v. *Rodgers*, 461 U.S. 677, 697 (1983).[11] Because disclosure does not materially advance taxpayer protection, the Tax Court's interest in maintaining its current process must prevail under *Mathews*.[12]

III. DISCLOSURE OF STJ REPORTS IS NOT COMPELLED BY THE INTERNAL REVENUE CODE

Petitioners and their amici suggest in the alternative (03-184 Br. 23; 03-1034 Br. 18, 42-49) that disclosure of STJ reports is compelled by the Internal Revenue Code's appellate review provision, 26 U.S.C. 7482(a)(1), and its disclosure provisions, 26 U.S.C. 7459, 7461. While the Tax Court is required to publish STJ reports to the extent the court adopts the STJ's recommendations, see 26 U.S.C. 7459(b), 7461, petitioners err in contending that an abandoned STJ report must be included in the record.

A. Disclosure Is Not Required Under Section 7482(a)(1)

Internal Revenue Code Section 7482(a)(1) requires that courts of appeals "review the decisions of the Tax Court * * * in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. 7482(a)(1). Clearly, the "decision[]" that

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[11] For that reason, the Court has tended to take a narrow view of the process required in tax cases. See pp. 30-31, *supra*; *Phillips* v. *Commissioner*, 283 U.S. 583, 595-597 (1931). The more limited reach of due process in the tax context, indeed, suggests that *Mathews* may not provide the proper framework for evaluating the Tax Court's procedures. See *Dusenbery* v. *United States*, 534 U.S. 161, 167-168 (2002) (observing that the Court has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims").

[12] For the same reason, petitioners' reliance (03-184 Br. 32 n.26) on *Goldberg* v. *Kelley*, 397 U.S. 254 (1970), which also suggests a balancing approach to determine the process due, is misplaced.

Congress intends appellate courts to review under Section 7482(a)(1) is the published opinion of the Tax Court, not the discarded "original" report of an STJ. By its terms, Section 7482(a)(1) identifies the decision for review as the "decision[] *of the Tax Court*" (emphasis added). Throughout the Internal Revenue Code, the term "decision of the Tax Court" is used to mean the decision entered by a regular judge of the Tax Court. Section 7459(a) of the Internal Revenue Code, for example, requires that the "decision[]" of the Tax Court "be made by a *judge* in accordance with the report of the *Tax Court*." 26 U.S.C. 7459(a) (emphasis added).[13] Similarly, Section 7459(b) recognizes that the Tax Court must "include in *its* report upon any proceeding *its* findings of fact or opinion or memorandum opinion." 26 U.S.C. 7459(b) (emphasis added). Where Congress intended entities other than the court's regular judges to enter the "decision[] of the Tax Court," it expressly provided for such entry. In particular, Section 7443A(c) specifies the limited circumstances in which "[t]he court may authorize a special trial judge to make the decision of the court." 26 U.S.C. 7443A(c). Those circumstances do *not* include proceedings like this case, and thus it is clear that an STJ's unadopted "original" report is not the "decision of the Tax Court" subject to appellate review.

It is equally clear that Congress did not intend the "in the same manner" language of Section 7482(a)(1) to import the standards or procedural rules applicable to proceedings before a magistrate judge (see 03-1034 Br. 27-28; Amicus Lederman Br. 11). Rather, the "same manner" requirement was added to clarify the scope of review in Tax Court proceedings after this Court held in *Dobson* v. *Commissioner*, 320 U.S. 489, 501-502 (1943), that Tax Court decisions were

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[13] The Code consistently uses the term "judge" to refer to Tax Court judges, whereas the designation "special trial judge" is used to refer to STJs. *E.g.*, 26 U.S.C. 7456(a) ("any judge *or special trial judge* * * * may administer oaths") (emphasis added).

subject to limited appellate review in light of the then-applicable statutory language requiring appellate courts to determine whether Tax Court decisions were "in accordance with law." *Id.* at 492; see Revenue Act of 1926, ch. 27, § 1003(b), 44 Stat. 9, 110. The "in the same manner" and "to the same extent" language merely clarified that Congress did not intend appellate courts to give special deference to Tax Court decisions.[14] See H. R. Rep. No. 2087, 80th Cong., 2d Sess. 16 (1948) (observing that intention was "to overrule the principle enunciated by the Supreme Court in the Dobson case * * * [which] had the effect of limiting the scope of the review of the cases decided by the Tax Court."); *InverWorld, Ltd.* v. *Commissioner*, 979 F.2d 868, 874 (D.C. Cir. 1992) (observing that Section 7482(a)(1) addresses only scope of review and "was not intended to bind the courts to any particular procedure for determining which *final* decisions are immediately appealable").

B. Disclosure Is Not Required Under Section 7459 Or 7461

Kanter (Br. 42-46) also erroneously reads the Internal Revenue Code's disclosure provisions to require disclosure of original STJ reports. See 26 U.S.C. 7461(a), 7459(b). By their terms, those provisions require disclosure only of reports adopted by the Tax Court.

Section 7461(a) provides that "all reports *of the Tax Court* and all evidence received by the Tax Court and its divisions * * * shall be public records open to the inspection of the public." 26 U.S.C. 7461(a) (emphasis added). Similarly,

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[14] Amicus Professor Leandra Lederman further errs in arguing (Br. 11-22) that STJ reports are evidence that must be included in the record in the same way magistrate judge reports are considered "original evidence" under the Federal Rules of Appellate Procedure. Under federal law, magistrate judges and special masters are *required* to file their reports with the district court and serve them on parties. That is not the case with STJ reports under the Internal Revenue Code. See pp. 33-34, *supra*.

Section 7459(b) provides that "[i]t shall be the duty of the Tax Court and of each division to include in *its* report upon any proceeding *its* findings of fact or opinion or memorandum opinion," and that "[t]he Tax Court shall report in writing all *its* findings of fact, opinions, and memorandum opinions." 26 U.S.C. 7459(b) (emphasis added). The phrase "report of the Tax Court" as used in those provisions is elucidated in Section 7459(a) of the Internal Revenue Code, which creates the "report" requirement. It provides that the report "of the Tax Court" is the document that serves as the basis for the "decision of the Tax Court," and that "[t]he decision *shall* be made by a judge *in accordance with* the report of the Tax Court." 26 U.S.C. 7459(a) (emphases added). Because the STJ's report cannot serve as the Tax Court's decision unless adopted by a judge of the Tax Court, see pp. 24-25, *supra*, reports that are not adopted cannot be the "report of the Tax Court" to which the disclosure requirements refer.

Kanter's attempt to bolster (Br. 43) his reading of those provisions by referencing a single case in which a court "referr[ed] to" the STJ report as the "initial report of the Tax Court," see *Louisville & Nashville R.R.* v. *Commissioner*, 641 F.2d 435, 443 (6th Cir. 1981), is unavailing. A single imprecise choice of words in a lower court opinion that does not consider the meaning of the Internal Revenue Code's disclosure provisions is not persuasive authority as to their meaning. Similarly, Kanter errs in relying (Br. 47-49) on a Senate Report stating that the disclosure provisions "will provide that all such proceedings, records, and evidence in connection therewith shall be public," S. Rep. No. 398, 68th Cong., 1st Sess. Pt. 2, at 12 (1924). The Senate Report does not describe the kinds of documents Congress intended to subject to disclosure, and thus its mere recognition of a disclosure requirement begs the question here.

Kanter's argument, moreover, would lead to absurd results. If abandoned STJ reports were "report[s] of the Tax Court," they would have to be published in the Tax Court's official case reports "for public information and use." 26 U.S.C. 7462. Indeed, Tax Court judges would be barred from modifying STJ reports under Kanter's interpretation of the Code, because Section 7459(a) *requires* the decision of the Tax Court to be "made * * * in accordance with the report of the Tax Court." That result, of course, is plainly contrary to Congress's intent. See 26 U.S.C. 7443A(b)(4) & (c).

Kanter's secondary argument (Br. 40-42) that any report submitted by the STJ is "evidence" within the meaning of the disclosure provisions mistakenly assumes that the STJ functions as a party litigant in the case such that the STJ's statements have "evidentiary" value. The case on which Kanter relies for that argument, *Gonzales* v. *United States*, 348 U.S. 407 (1955), demonstrates the flaw in the argument. In *Gonzales*, this Court held that an individual seeking a deferment from military service was entitled to review a Department of Justice recommendation concerning the deferment request that had been submitted to the Selective Service Appeal Board, the agency with authority to decide the request. *Id.* at 412. The Court reasoned that, because the Department of Justice was the entity framing the arguments against petitioner's deferment request, "petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions." *Id.* at 414. As the Court noted, the "right to a hearing embraces * * * a reasonable opportunity to know the claims of the opposing party." *Id.* at 414 n.5 (quoting *Morgan* v. *United States*, 304 U.S. 1, 18 (1938)). In this case, the opposing party is the Commissioner of Internal Revenue, not the STJ. It is the Commissioner's submissions that frame the arguments against petitioners,

and those submissions are, of course, disclosed and become part of the record. The STJ, in contrast, operates within the adjudicative body itself, and his statements are not evidence.[15]

C. There Is No Common Law Right To Disclosure Of STJ Reports And No Cause For An Exercise Of The Court's Supervisory Powers

Kanter is wrong to claim (Br. 44-46) that the "common-law" right of access extends to STJ reports. Indeed, because the question whether disclosure is compelled by an alleged "common law right" is not fairly contained in the questions presented, it is not a question that this Court should review. See Sup. Ct. R. 14.1(a). In any event, the common law right has never been interpreted to extend to a court's internal deliberations. Thus, the public has no right of access to court conferences, draft opinions, or internal court memoranda, just as a party has no right to take discovery of a judge's thought processes. See pp. 16-17, *supra*.

Nor would an exercise of this Court's supervisory powers be appropriate. Again, that issue is not fairly included in the questions presented. In any event, the exercise of supervisory power sought by Kanter (03-1034 Br. 49-50) would be outside the normal scope of that power. This Court has never exercised its supervisory authority to alter the rules of an Article I tribunal, such as the Tax Court, that has been vested by Congress with exclusive authority to promulgate its own rules, and it should not do so here. See 26 U.S.C. 7453, 7443A; compare 26 U.S.C. 2071(a) & 2072(a) (conferring authority on this Court to prescribe rules for itself and for district courts, magistrates, and courts of appeals, but not the Tax Court); see also *Dickerson* v. *United States*, 530 U.S.

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[15] Kanter also characterizes this argument (Br. 39-42) as implicating his right to an effective "hearing" before the Tax Court. That issue is not fairly included within the questions presented, which are limited to issues of appellate review.

428, 437 (2000) ("supervisory authority over the federal courts" is subject to "ultimate authority" of Congress absent constitutional constraints).

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 26 U.S.C. 7443A (1994) provided in pertinent part:

Special trial judges

(a) Appointment. The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court.

(b) Proceedings which may be assigned to special trial judges. The chief judge may assign—

(1) any declaratory judgment proceeding,

(2) any proceeding under section 7463,

(3) any proceeding where neither the amount of the deficiency placed in dispute (within the meaning of section 7463) nor the amount of any claimed overpayment exceeds $10,000, and

(4) any other proceeding which the chief judge may designate,

to be heard by the special trial judges of the court.

(c) Authority to make court decision. The court may authorize a special trial judge to make the decision of the court with respect to any proceeding described in paragraph (1), (2), or (3) of subsection (b), subject to such conditions and review as the court may provide.

* * * * *

2. 26 U.S.C. 7459(a) and (b) provide:

Reports and decisions

(a) Requirement. A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) Inclusion of findings of fact or opinions in report. It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions. Subject to such conditions as the Tax Court may by rule provide, the requirements of this subsection and of section 7460 are met if findings of fact or opinion are stated orally and recorded in the transcript of the proceedings.

* * * * *

3. 26 U.S.C. 7460(b) provides:

Provisions of special application to divisions

(b) Effect of action by a division

The report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the chief judge has directed that such report shall be reviewed by the Tax Court. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Tax Court except in accordance with such rules as the Tax

Court may prescribe. The report of a division shall not be a part of the record in any case in which the chief judge directs that such report shall be reviewed by the Tax Court.

4. 26 U.S.C. 7461(a) provides:

Publicity of proceedings

(a) General rule. Except as provided in subsection (b), all reports of the Tax Court and all evidence received by the Tax Court and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public.

5. 26 U.S.C. 7462 provides:

Publication of reports

The Tax Court shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Tax Court therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents.

6. 26 U.S.C. 7482(a)(1) provides:

Courts of review

(a) Jurisdiction.

(1) In general. The United States Courts of Appeals (other than the United States Court of Appeals

for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

7. Tax Court Rule 183 provides:

Other Cases

Except in cases subject to the provisions of Rule 182 or as otherwise provided, the following procedure shall be observed in cases tried before a Special Trial Judge:

(a) Trial and Briefs: A Special Trial Judge shall conduct the trial of any such case assigned for such purpose. After such trial, the parties shall submit their briefs in accordance with the provisions of Rule 151. Unless otherwise directed, no further briefs shall be filed.

(b) Special Trial Judge's Report: After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial Judge shall submit a report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Judge or Division of the Court.

(c) Action on the Report: The Judge to whom or the Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive

further evidence or may direct oral argument, or may recommit the report with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

8. Tax Court Rule 182 (1974) provided:

Post-Trial Procedure

Except in small tax cases (see Rule 183) or as otherwise provided, the following procedure shall be observed in cases tried before a commissioner:

(a) Proposed Findings and Briefs: Each party shall file his initial brief, including his proposed findings of fact and legal argument, within 60 days after the date on which the trial is concluded, unless otherwise directed. A party thereafter desiring to file a responsive brief shall do so, including any objections to any proposed findings of fact, within 30 days after the expiration of the period for filing the initial brief, unless otherwise directed. With respect to the content, form, number of copies, and other applicable requirements, the proposed findings of fact and the briefs shall conform to the provisions of Rule 151.

(b) Commissioner's Report: After all the briefs have been filed by all the parties or the time for doing so has expired, the commissioner shall file his report, including his findings of fact and opinion. A copy of the report shall forthwith be served on each party.

(c) Exceptions: Within 45 days after service of the commissioner's report, a party may file with the Court a brief setting forth any exceptions of law or of fact to that report. Within 30 days of service upon him of such brief, any other party may file a brief in response thereto. In any brief filed pursuant to this paragraph, a party may rely in whole or in part upon the briefs previously submitted by him to the commissioner under paragraph (a) of this Rule 182. Unless a party shall have proposed a particular finding of fact, or unless he shall have objected to another party's proposed finding of fact, the Court may refuse to consider his exception to the commissioner's report for failure to make such a finding desired by him or for inclusion of such finding proposed by the other party, as the case may be.

(d) Oral Argument and Decision: The Division to which the case is assigned may, upon motion of any party or on its own motion, direct oral argument. The Division inter alia may adopt the commissioner's report or may modify it or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions. Due regard shall be given to the circumstance that the commissioner had the opportunity to evaluate the credibility of witnesses; and the findings of fact recommended by the commissioner shall be presumed to be correct.

9. Tax Court Rule 48 (1944) provided:

Commissioners of the Tax Court

(a) The term "commissioner" as used in this Rule 48 applies to any attorney on the legal staff of this Court who shall have been designated by the

Presiding Judge as a "commissioner in a particular case" pursuant to section 1114 of the Internal Revenue Code, as amended by section 503 of the Revenue Act of 1943.

(b) The commissioner shall conduct the hearing in such case in accordance with the Court's rules of practice. He shall rule upon objections and other evidentiary matters in accordance with the rules of evidence as provided in section 1111, and shall exercise such further and incidental authority, including the issuance of subpoenas, as may be necessary for the conduct of the hearing.

(c) Unless otherwise directed the parties shall have 30 days from the closing of proof in the case for filing proposed findings of fact. Such findings of fact shall be prepared in the manner and form prescribed in the first paragraph of Rule 35(b).

Upon the filing by the parties of their proposed findings of fact, the commissioner shall prepare and submit to the Court or a Division thereof a report of his findings of fact based upon the evidence in the case, and copies thereof shall be served upon both parties.

Within 20 days from the filing of the commissioner's proposed findings of fact the parties may file exceptions thereto which will be considered by the Division to which the case is assigned.

(d) Unless otherwise directed by the Court, the parties shall have 45 days from the date of the filing of the commissioner's proposed findings of fact within which to file briefs, and 15 days additional

within which to file reply briefs. Each brief shall be prepared in the manner and form prescribed in Rule 35.

(e) Upon motion of either party, or upon its own motion, the Division to which the case is assigned may in its discretion direct oral argument and set a date therefor.

10. United States Tax Court General Order Number 5 (1976) provided:

Additional Cases Assigned to Special Trial Judges

A. Purpose

Both the number of new cases filed in the United States Tax Court and the total number of cases involving deficiencies under $2,500 have increased substantially in the past year, and there is reason to believe that the work of the Court will continue at a higher level. Thus, it appears advisable to make changes in the present practices of the Court in order to dispose of pending cases more promptly and efficiently. To accomplish those objectives, it has been decided that additional cases should be assigned to the Special Trial Judges of the Court for trial or other disposition.

B. Cases Assigned

The Court has followed the practice of assigning most of the "small tax cases" to Special Trial Judges for trial or other disposition. The work of the Court has been reviewed for the purpose of deciding what additional cases could be assigned to the Special Trial Judges. We have sought to select

cases in which the parties would find a trial by the Special Trial Judges to be most suitable. In the light of this criterion, it appears appropriate to assign to the Special Trial Judges additional cases involving relatively small deficiencies.

C. Procedures

1. In accordance with this order and Rule 180, Tax Court Rules of Practice and Procedure, the Chief Judge may assign to a Special Trial Judge for trial or other disposition cases which are not "small tax cases" as defined in Rule 171, Tax Court Rules of Practice and Procedure, but in which the amount of the deficiency in income or gift taxes does not exceed $2,500 in any one taxable year or the deficiency in estate tax does not exceed $2,500.

2. All proceedings in cases assigned to Special Trial Judges in accordance with this order shall be conducted in accordance with the Tax Court Rules of Practice and Procedure, and the Special Trial Judges shall have all the powers described in Rule 181. However, Rule 182 provides in part that its provisions are applicable "[e]xcept in small tax cases (see Rule 183) or as otherwise provided." Since the amount at issue is small in the cases assigned to the Special Trial Judges in accordance with this order, it is clearly impracticable and undesirable to follow the post-trial procedures set forth in Rule 182. Accordingly, pursuant to the authority of such rule to provide otherwise, it has been decided that such procedures shall not be applicable in the cases assigned to the Special Trial Judges in accordance with this order.

3. If either party objects to having the case tried in accordance with the procedures established by this order, he may file a motion to that effect within 15 days after service of the notice setting the case for trial before a Special Trial Judge, setting forth his objections to having the case so conducted. In considering such motion, the Court will take into consideration the amount in controversy, the significance of the matter at issue, the convenience of the parties, and the responsibilities of the Court.

D. Opinions

As soon as practicable after hearing a case assigned to him in accordance with this order, a Special Trial Judge shall prepare his proposed findings of fact and opinion and submit them to the Chief Judge, or to another Judge designated by him for that purpose. The proposed findings of fact and opinion of the Special Trial Judge shall not constitute the findings of fact and opinion of the Court unless reviewed and adopted by the Judge to whom the case is assigned, and the report is approved by the Chief Judge.